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Welsh v. Wisconsin — A View from Counsel

GORDON B. BALDWIN*

I. INTRODUCTION

On May 15, 1984, the United States Supreme Court upheld Edward Welsh's claim that police could not, without consent and without a warrant, enter his home to arrest him for drunk driving, a nonjailable offense committed outside their presence. Justice Brennan, expressing the views of six Justices, rejected the claim that exigent circumstances allowed a warrantless nonconsensual home entry. "[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."¹ Home entries, continued the Court, "should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed."²

Margaret Satterthwaite and I were prevailing counsel in the Supreme Court and the result was, of course, pleasing. How this case got so far, how we became involved, and how fortuitous events, more than counsels' skills, produced the rarity of a recent Supreme Court opinion upholding a fourth amendment claim, is the subject of this article.

Cases beginning in traffic courts seldom reach the Supreme Court. Indeed, the accidents and errors that led the case on that path are unusual. The issues stressed by Justice Brennan were not clearly presented to any of the three Wisconsin courts. Normally the Supreme Court does not grant review if the precise question was not thoroughly litigated below.³ The Wisconsin Supreme Court's opinion, and the stinging dissent

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1. *Welsh v. Wisconsin*, 104 S. Ct. 2091, 2099 (1984).

2. *Id.*

3. See Brennan, *State Court Decisions And The Supreme Court*, 31 PENN. BAR ASS'N Q. 393, 399-400 (1960).

by Justice Abrahamson, pointed the case to our highest court.⁴

II. THE TALE UNFOLDS

A. *Factual Background*

The facts are commonplace. Edward Welsh was driving home a little after dark on a rainy April evening in 1978. A witness, who happened to be the University of Wisconsin's notable crew coach, Randy Jablonic, saw the Welsh car swerve across oncoming traffic and stop in an open field. Jablonic stopped, too. Jablonic later testified that he talked to the driver, Edward Welsh, and refused Welsh's pleas for a ride home. Welsh, Jablonic concluded, was either intoxicated or sick "or not very much in possession of his faculties." Welsh then abandoned his car and walked off into the night. Police arrived within a few minutes and talked to Jablonic. They later testified that Jablonic unambiguously stated that the absent driver was "very obviously intoxicated." Police traced the car to Edward Welsh, who lived within half a mile of the field where it was abandoned, and the three policemen drove to the Welsh residence. They entered, claiming they were invited by Mrs. Welsh and by one of her daughters, a girl then just seventeen. They arrested Edward Welsh as he lay naked in his upstairs bedroom, ordered him to dress, took him on the four mile journey to the Madison police station and asked him to take the standard breath test for alcohol. Welsh, who had taken a drink or so after returning home, refused. Under Wisconsin's Implied Consent Law an unreasonable failure to take a blood alcohol test justifies suspension of driving privileges.⁵ The arresting officer therefore issued a citation for driving while intoxicated, and Welsh's refusal to take a blood alcohol test was reported to the Department of Motor Vehicles.

The case was routine. The Department of Motor Vehicles issued a notice of their intention to suspend Welsh's license. Because records disclosed a prior arrest for driving while intoxicated, the District Attorney also substituted a criminal

4. *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982), *cert. granted*, 459 U.S. 1200 (1983).

5. WIS. STAT. § 343.305 (1983-84). Amendments since 1978 are not relevant to the case.

complaint for the citation, a procedure commanded for second offenders. Welsh now faced two charges. First, the criminal charge for a second offense of operating a motor vehicle while intoxicated⁶ and second, a civil charge for refusing a blood alcohol test which could lead to the suspension of his driver's license. The criminal charge required a trial; the civil charge allowed Welsh a hearing to determine whether his refusal to take a blood alcohol test was "reasonable."

Welsh was represented by Archie Simonson of Madison, an experienced practitioner who, until his defeat in a recall election in 1977, served as a Dane County Circuit Judge. Simonson promptly challenged both charges on the ground that there was no justification for the warrantless in-house arrest in that everyone in the home denied giving the police consent to enter. Welsh's defenses rested on Wisconsin law, which provides that jurisdiction may not be based upon an unlawful arrest,⁷ and upon the fourth and fourteenth amendments. Wisconsin law explicitly commands that a valid arrest precede a blood alcohol test.⁸ It therefore was not necessary to invoke the exclusionary rule. The defense motions focused upon a nonconsensual entry, and upon the failure of the police to show "hot pursuit." A separate evidentiary hearing was required for both the criminal and civil charges.

The State's response was obvious: namely that the officers had consent to enter, and that even if consent were lacking, exigent circumstances excused the normal rule that arrests in the home require warrants. Furthermore, the State argued, had the police delayed their entry, evidence of intoxication would have disappeared. Nobody raised two points that should have been equally clear: that at the time of the arrest the police had no probable cause to believe Edward Welsh would face criminal charges; and that it was debatable whether a Wisconsin judge could have issued an arrest warrant for a first offender (rather than a summons).⁹

6. WIS. STAT. § 346.63 (1983-84). Amendments since 1978 are not relevant to the case.

7. The principle was established in *Laasch v. State*, 84 Wis. 2d 587, 267 N.W.2d 278 (1978).

8. *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286, 292 (1974).

9. See WIS. STAT. § 968.04(2)(b) (1983-84).

B. *The Wisconsin Courts*

The cases were assigned to Judge Buenzli. However, Judge Buenzli confronted a heavy docket, and he was planning on retirement toward the end of 1978. He didn't reach the Welsh cases, so they were routinely assigned to his successor, Judge Boll. Judge Boll came to the bench with an equally heavy load, and drunk driving cases didn't command priority. Not until February 1980 did he schedule hearings on the pre-trial motions on the criminal charge. Edward Welsh, his two stepdaughters and his wife dutifully appeared and were ready to testify. The most important witness was the stepdaughter who answered the door the night that police arrived at the Welsh residence. Her sister and her mother were prepared to confirm her claim and confirm that no one gave the police permission to enter. Police Officer Daley, on the other hand, would testify that he had proper consent to enter. Unfortunately the young assistant district attorney handling the case was on vacation and his substitute was unprepared. Judge Boll declined to hear testimony from the Welsh family. He dismissed the case, and despite defendant's objections stated that the State could begin again. The State promptly filed and served a new criminal complaint. Simonson repeated his motions, and the file grew larger. Ironically, the delays gave Welsh's counsel the benefit of a better argument. In April 1980 the Supreme Court issued its opinion in *Payton v. New York*¹⁰ holding that a warrantless nonconsensual entry into a suspect's home to make a routine felony arrest violated the fourth amendment. The Court explicitly left open whether exigencies might excuse the warrant requirement, and implicitly invited petitions for review on the scope of the exigent circumstances doctrine.

Another evidentiary hearing on the criminal charges was scheduled for July 14, 1980 before Dane County Circuit Judge Mark Frankel. The State was now ready, but unfortunately a critical witness, the stepdaughter who had met the policemen at Welsh's door, had left home to marry. She was living in California and could not return. The other stepdaughter had also left the Welsh home and was unavailable. Judge Frankel

10. 445 U.S. 573 (1980).

recognized that it was impossible to rule on the consent issue without the key witnesses, and he therefore suggested that if the State could establish the presence of exigent circumstances or hot pursuit the consent issue would become irrelevant. On those points the court heard testimony from the arresting officer, Randy Jablonic, and Mrs. Welsh. The thrust of Simonson's attack was that too much time had elapsed between the police discovery of the abandoned car and their entry into the house. The judge was unconvinced. Judge Frankel found the arrest justified by the exigent circumstances doctrine and by the "reasonably hot pursuit." He rejected an analogy to *Payton v. New York* on these grounds. In September 1980 Judge Frankel held a hearing on whether Welsh's refusal to take a blood alcohol test was reasonable. He stated he was bound by his prior rulings and despite the additional testimony of Edward Welsh, concluded that the refusal was not justified.

After losing the motions Welsh still faced the two different charges: the criminal charge arising from a second arrest for driving while intoxicated, and the civil forfeiture involving the loss of driving privileges. Simonson appealed to the Wisconsin Court of Appeals on the civil forfeiture issue, and there prevailed. On May 26, 1981 Judge Paul Gartzke, acting alone, ruled that Welsh was unlawfully arrested.¹¹ Judge Gartzke rejected application of the exigent circumstances exception and instead balanced the need to enter a dwelling to preserve evidence against the seriousness of the invasion. The judge stated that "the need to search defendant's home to preserve evidence was low compared to the interest invaded by the search." He remanded the case to determine whether entry was gained by consent.

The State appealed. Perhaps their chief motive was to clarify the power of a single court of appeals judge to rule on appeals from orders suspending driving licenses. The State also appealed the ruling that the warrantless arrest in the home was not justified by exigent circumstances. Seventeen pages of its brief focused on that issue. *State v. Welsh* was argued on March 1, 1982 and the Wisconsin Supreme Court came down with its opinion on July 2.¹² The delay strongly

11. The decision is unreported. It should be.

12. 108 Wis. 2d 319, 321 N.W.2d 245 (1982).

suggests that the case was difficult. The tone of Justice Abrahamson's dissent, joined by Justice Heffernan, suggests that the 4-2 decision prompted vigorous debate in chambers.¹³

III. APPEAL TO THE UNITED STATES SUPREME COURT

A. *The Petition for Certiorari*

After reading the opinion that summer, my view, shared by several colleagues, was that the majority opinion of the Wisconsin Supreme Court was inconsistent with fourth amendment law. Others, including Margaret Satterthwaite who had just completed a clerkship with Justice Heffernan, saw the opinion as a calamity. Its implications were indeed threatening. Could police forcibly enter a home if a persuasive eyewitness reported that an occupant was recently driving while intoxicated? Anyone could imagine the consequences of such a license.

The decision was referred to the New York headquarters of the American Civil Liberties Union. About a week before the deadline for filing a timely petition for certiorari, we learned that the national ACLU had no interest in taking the case. We never knew their reasoning. Perhaps the prospect of representing an alleged drunk driver was not appealing, or perhaps they thought the Wisconsin decision correct. The Wisconsin Civil Liberties Foundation disagreed, and attorney Charles F. Kahn, Jr., subsequently wrote a splendid amicus brief challenging the Wisconsin ruling.

Margaret Satterthwaite and I were troubled by the consequences that might flow from the Wisconsin Supreme Court's license to enter homes, so we talked with Mr. Simonson and asked him whether he was petitioning for review in the United States Supreme Court. His clients lacked funds, and he had already spent inordinate time on the case, so he asked me if I was interested. Of course I was, and the assurance of Margaret's aid made my decision easy. Simonson promptly conferred with his client, who graciously invited us to take over. The public defender, then David Niblack, agreed that the is-

13. Justice Ceci did not sit on the case. If one of the majority had switched, Chief Justice Beilfuss for example, the vote would have been a tie, no opinion would have been issued and Judge Gartzke's opinion would have stood.

sue was important and indicated that, if Edward Welsh qualified for assistance through the public defender program, that office would pay expenses, within statutory limits. Because I was already on the University of Wisconsin's payroll and was then Chairman of the Public Defender Board, I agreed to serve without a fee. However, Margaret, who had taken employment in Racine, received the standard, although pitiful, statutory rate of \$25 per hour.¹⁴

The critical dilemma was what to include in the petition for certiorari. Two issues were obvious: whether there was sufficient probable cause, and whether a warrantless arrest was justified in the circumstances. We argued more about the first. I was reluctant (Margaret will doubtless say stubbornly reluctant), to include this in our petition. The issue had been decided in the Wisconsin Supreme Court, but I thought it distracting. Moreover, the arresting officers had probably acted in good faith and I feared that the Court might use good faith to justify a home entry.¹⁵ Besides, there was evidence on the record that the arresting officer knew that Edward Welsh was no teetotaler. The officer had arrested Welsh in his home several weeks before the April 1978 event on a disorderly conduct charge, unrelated to driving. Welsh, he said, was then drunk. On balance, despite supporting arguments raised in Justice Abrahamson's dissent, I thought that a challenge on probable cause grounds would fail. Perhaps if we had debated longer Margaret would have prevailed, but we were pressed for time.

The petition for certiorari drafted by Margaret Satterthwaite was simple. It consisted of three pages of facts and one page of law. We relied on only two cases, *Payton v. New York*,¹⁶ which explicitly left open the meaning of the exigent circumstances doctrine, and *Camara v. Municipal Court*,¹⁷ where a warrant was required in a civil case. Fourth amendment case law is littered with statements about the sanctity of the home, and we believed it unnecessary to belabor the obvi-

14. WIS. STAT. § 977.08(4m) (1983-84).

15. On January 11, 1982, the Supreme Court granted review of *Illinois v. Gates*, a case in which the State of Illinois argued for a good faith exception to the exclusionary rule. See *infra* note 21.

16. 445 U.S. 573 (1980).

17. 387 U.S. 523 (1967).

ous. We focused on a point mentioned by the Wisconsin Supreme Court, but not discussed by the majority: that police officers knew Welsh was being arrested for a nonjailable offense.

In retrospect we should have cited *United States v. Vasquez*,¹⁸ wherein Justices Brennan, White and Marshall dissented and urged the Court to consider an exigent circumstances claim. Justice Stevens' concurrence indicated his receptiveness to hearing an exigent circumstances case if the issue was more sharply presented. We decided not to clutter the short petition with more references. The issue upon which we sought review was simply stated. The majority and dissenting opinions of the Wisconsin Supreme Court were clear and sharply focused on the fourth amendment. A short petition would make the work of the Justices, and their clerks, easier.¹⁹

Edward Welsh, meanwhile, was much engaged. His trial on the criminal charge was held before a Dane County jury, which in January 1983 reached a verdict, after hearing the testimony of the arresting officer, of driving while intoxicated. Welsh received a five day jail sentence, which was stayed pending appeal. Indeed, all further proceedings were stayed pending action by the United States Supreme Court. On November 9, 1982 the Court directed the Attorney General of Wisconsin to file by December 9 a response to the Welsh petition. This was a good sign for petitioners—the Court routinely dismisses many petitions for review without hearing the other side. Now the burden fell on the Attorney General of Wisconsin, who assigned the case to one of his ablest young lawyers, Stephen W. Kleinmaier, who had argued the case in both the Wisconsin Court of Appeals and the Wisconsin

18. 638 F.2d 507 (2nd Cir. 1980), *cert. denied*, 454 U.S. 975 (1981).

19. We spent as much time reviewing the Supreme Court Rules and obtaining guidance on the forms and procedure recommended in STERN & GRESSMAN, SUPREME COURT PRACTICE (5th ed. 1978), as we did on the substantive research. Although rules are relaxed for petitions *in forma pauperis*, see SUP. CT. R. 46, as ours was, we meticulously honored the procedures for paid cases except the requirement that the petition be printed. The recent purchase of a simple Olivetti ET231 memory typewriter immensely eased our task. Margaret is a gifted writer and a sharp thinker. To her goes the credit for a sharp and eventually persuasive petition. Roberta Marcus, who typed the final product, was additionally valuable. She can spot a missing comma from thirty paces.

Supreme Court. Coincidentally, Stephen, like Margaret, was a former law clerk for Justice Heffernan.

The Attorney General's nine page response was coupled with a 176 page appendix, the purpose of which was to demonstrate that no one had argued in the state court proceedings that the police authority to enter was limited because the suspected offense was only punishable by a civil forfeiture. This, of course, was exactly the response we anticipated. We were mildly comforted that Simonson's responding brief in the Wisconsin Supreme Court noted that when they arrested him police did not know that Welsh had a prior conviction. That point, however, was only made in claiming that police lacked probable cause to make an arrest. The Attorney General's brief discussion on the exigent circumstances doctrine suggested that the issue turned on the sufficiency of the evidence, and that such evidentiary issues are not ordinarily reviewed by the United States Supreme Court.

We were forced to reply quickly if we were to be heard. The Court could have acted immediately and was not obliged to wait for replies. Hence we drafted and mailed our six page reply on December 17, 1982. We relied heavily upon Supreme Court Rule 21.1(a), which states that "the question presented will be deemed to compromise every subsidiary question fairly included therein." From the beginning of the case, we argued, a fourth amendment claim was persistently advanced. "Quintessentially the question presented and 'fairly included therein,' is the sort of emergency . . . which will justify a warrantless non-consensual entry into the home." Furthermore, we said, the State of Wisconsin and its Supreme Court had relied upon the traffic arrest statute,²⁰ and that statute specifically concerns arrests punishable only by civil forfeitures. All hands agreed, we said, that the exigent circumstances doctrine was forcefully argued in all the state courts.

Having done all required, we waited and worried. I remained convinced that our case was cert-worthy and would fit neatly with other cases on the Court's docket. In January

20. WIS. STAT. § 345.22 (1983-84).

1982 the Court granted review in *Illinois v. Gates*.²¹ That case gave the Court an opportunity to consider a "good faith" exception to the exclusionary rule, and the conventional wisdom was that a majority would sustain police who scrupulously obeyed a technically deficient warrant. Our cases did not involve warrants or the exclusionary rule, and hence would allow the Court to confirm fourth amendment values without addressing a controversial doctrine. On the docket also were cases involving warrantless searches of a package,²² an automobile,²³ a shoulder bag carried by an arrestee,²⁴ and a drunk driving case.²⁵ The latter considered whether evidence of a defendant's refusal to take a blood alcohol test could be used at trial. Of special interest were a pair of cases involving the modern application of the "open fields" doctrine, namely whether warrantless entries upon private land were permitted in view of the more recent focus on legitimate expectations of privacy. The Court granted review in *Oliver v. United States* on January 24, 1983,²⁶ and later in *Maine v. Thornton*.²⁷ The Court might, I thought, allow warrantless entries onto open fields, but hold a warrantless home entry was forbidden. The Court in January also agreed to hear *Michigan v. Clifford*,²⁸ an interesting case involving a warrantless home entry by an arson investigator six hours after the blaze was extinguished. However, the Clifford home, in contrast to Welsh's, was unoccupied. By mid-February nearly all the petitions filed contemporaneously with *Welsh* had been acted upon.

The Supreme Court's telephone answering service is uncommonly helpful and unfailingly gracious. At their fingertips the Clerk's office has a computer which will give callers the latest orders. I habitually took advantage of their courtesy on every order day from January 10, 1983 onward. I was fi-

21. The petition for certiorari was granted in 454 U.S. 1140 (1982). Ultimately the Court refused to address the good faith exception in *Gates*, ruling that it had not been properly raised in the Illinois courts. See *Illinois v. Gates*, 462 U.S. 213 (1983).

22. *Illinois v. Andreas*, 103 S. Ct. 3319 (1983).

23. *Michigan v. Long*, 103 S. Ct. 3469 (1983).

24. *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983).

25. *South Dakota v. Neville*, 459 U.S. 553 (1983).

26. 104 S. Ct. 1735 (1984).

27. 104 S. Ct. 1735 (1984).

28. 104 S. Ct. 641 (1984).

nally rewarded on February 22.²⁹ The Court had granted review that morning in two *in forma pauperis* cases, ours and *Segura v. United States*.³⁰ I talked with Segura's counsel to determine whether our cases were sufficiently alike to justify an exchange of briefs. They were not. Margaret and I now had to prepare ours. We knew that the Court's argument docket was full for the remaining weeks in the 1982 term and that we could probably expect a reasonable extension of the normal forty-five day briefing period.³¹ Indeed, both sides asked for and received modest extensions of time in the briefing schedule. Quite aside from the demands of counsels' schedules, the delay gave both sides an opportunity to consider all the cases coming down in the 1982 term.

B. Preparing The Brief

Counsels' first task was to agree on the contents of a joint appendix required by Supreme Court Rule 30. The procedure was simple. Margaret and I rooted through the official record, noted the parts we thought helpful and relevant, and then asked Stephen Kleinmaier if he wanted to include anything more. He did suggest a few dozen more pages, primarily taken from the transcript of the evidentiary hearings. We had no disagreements on the contents. The joint appendix must be prepared to the standards commanded by the Supreme Court's unique rules.³² This was a tedious chore because photocopies are not permitted, and without the extraordinarily versatile WANG word processors harbored at my university, and their uncommonly talented operators, the job would have taken longer than the forty-five days commanded by the rules. Nearly half of the 213 page joint appendix consisted of the Wisconsin Court of Appeals and Supreme Court opinions. I pray that the next revision of the Supreme Court rules will allow photocopies of at least the printed opinions of the courts

29. See 459 U.S. 1200 (1983).

30. *Id.*

31. Justice White's comments on the unusually heavy 1982 Term docket are reported in 51 U.S.L.W. 3191 (U.S. Sept. 28, 1982).

32. Supreme Court Rule 33 commands 11 point type for text, 9 point for footnotes, on 6 1/8" x 9 1/4" pages with margins of at least 3/4" on all sides. The color of the covers is also directed, and page limits are imposed.

below. Typing them over was tedious, invited copy errors, and was wasteful.

Margaret and I debated every word in our brief. Research was not difficult—we both had a pretty fair grasp of fourth amendment law, and we knew that the Court was thoroughly familiar with it too, inasmuch as the current Court has made most of it recently. The views of all except Justice O'Connor are recorded in their opinions. In *United States v. Watson*³³ and *Payton v. New York*³⁴ there are accurate reviews of fourth amendment history, so we did not feel obliged to offer an historical review. Among the ten recent law review articles on home arrests there was a nice one published in the Arizona Law Review in 1981.³⁵ We thought it politic to include that reference for the benefit of Justices Rehnquist and O'Connor, two Arizona natives. We found no cases involving blood test obtained via a warrantless home arrest, although *Schmerber v. California*³⁶ allowed a compulsory test in a hospital a few hours after an auto accident. Both state and lower federal courts had, however, handed down many decisions evaluating exigent circumstances claims.

Our claim rested on two grounds: first, at common law the exigent circumstances doctrine applied only to arrests for major crimes; and second, it is unreasonable for law enforcement to invade the home for minor offenses. Such invasions could not be justified because the immediate arrest of such an offender is less important than security of people against unreasonable searches and seizures. Our principal problem was to decide how to organize our presentation. We argued the alternatives. Margaret's arguments were most persuasive. If the best briefs are the product of robust debate, ours would be good indeed.

Justice Robert Jackson's warning in *McDonald v. United States*³⁷ was helpful. Counsel finding a relevant Jackson opinion is well advised to use it—his graceful style enriches and

33. 423 U.S. 411 (1976).

34. 445 U.S. 573 (1980).

35. See Note, *Exigent Circumstances for Warrantless Home Arrests*, 23 ARIZ. L. REV. 1171 (1981), cited in *Welsh v. Wisconsin* 104 S. Ct. 2091, 2099 n.13 (1984).

36. 384 U.S. 757 (1966).

37. 335 U.S. 451, 457 (1948)(Jackson, J., concurring).

informs. *McDonald* involved a forced entry to break up a numbers game. Police should not enter, he said:

"[W]hile the enterprise of parting fools from their money . . . is one that ought to be suppressed, I do not think that its suppression is more important to society than the security of the people against un-reasonable searches and seizures."³⁸

Margaret was more certain than I that we had to argue that under no circumstances would a warrantless home entry be permitted to take a blood alcohol test for a minor offense. I don't like absolute arguments, and I don't think the Supreme Court's majority does either. However, some common law precedents favored the absolute rule, and I decided we were bound to make that claim for our client. It was more likely, we thought, that the Court would be receptive to a totality of circumstances approach to the exigent circumstances doctrine.³⁹ We identified three somewhat different approaches to the doctrine in the lower courts. The first, a somewhat mechanical, if not uncertain, balancing of seven factors, was advanced by the District of Columbia Court of Appeals in *Dorman v. United States*.⁴⁰ The second was represented by a group of mostly California cases which simply defined an exigency as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."⁴¹ A third line of cases simply directed courts to focus on the facts, but included examination of whether or not there was time to get a warrant.⁴² We were troubled by Professor LaFave's treatise, cited by the Wisconsin Supreme Court, which urged a presumption favoring warrantless entries where there was an ongoing police investigation.⁴³ The Court likes Professor LaFave's work, as

38. 335 U.S. at 460.

39. The totality of circumstances rule was adopted in *Illinois v. Gates*, 462 U.S. 213 (1983).

40. 435 F.2d 385 (D.C. Cir. 1970).

41. *People v. Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976), cert. denied, 429 U.S. 929 (1976). See also *State v. Canby*, 252 S.E.2d 164 (W. Va. 1979).

42. See generally Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALB. L. REV. 90, 109-10 (1980).

43. W. LAFAVE, SEARCH AND SEIZURE 391-92 (1978).

do I, although my admiration for one of Wisconsin Law School's distinguished graduates is tempered when his arguments do not favor a client. The LaFave presumption, moreover, would swallow the general rule against allowing warrantless nonconsensual entries.⁴⁴

Entries to prevent imminent destruction of evidence are commonly permitted by lower federal courts. We could easily distinguish those cases because nearly all involved entries to prevent evidence from being eaten, burned, or flushed down a toilet. The evidence in the *Welsh* case was already within Edward Welsh's body. Indeed, Mr. Welsh admitted he drank "half a pint of Canadian Club" after returning to his bedroom.⁴⁵ The destruction issue was a problem, of course. I spent an interesting afternoon researching the rate at which alcohol is absorbed into the blood. A distinguished pharmacologist at the University helped me, and I decided to suggest that the Court take judicial notice that the rate of absorption can be so slow that an arrest warrant could have been obtained before entry.⁴⁶ Pushing that argument was difficult because the record did not disclose that several Dane County judges live very close to the Welsh home. Indeed, we learned that Dane County judges have a duty roster requiring one of them to be available to hear warrant requests at any time, day or night. That was not in the record either.

We received an interesting suggestion from my colleagues Frank Remington and Herman Goldstein, eminent experts on police behavior and criminal procedure. Why not suggest the use of a telephone warrant? This matter was touched upon also by an able third year Wisconsin law student who subsequently published a note on the *Welsh* case.⁴⁷ Search warrants can be obtained by telephone under Federal Rule of Criminal Procedure 41(c)(2). A Wisconsin law enacted in

44. This point was stressed in *People v. Smith*, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972).

45. Joint Brief at 99, *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984).

46. See Brief for Petitioner at 49, *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984). See also GOODMAN & GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 382 (6th ed. 1980), a standard work, I'm told. The page cited is lucid and among the few in a vast reservoir of facts a layman might understand.

47. See Note, *Balancing on the Brink of the Chasm: The Exigent Circumstances Exception and the Fourth Amendment's Categorical Balancing Test in State v. Welsh*, 1983 WIS. L. REV. 1023, 1081.

1984 authorized telephone search warrants.⁴⁸ Similarly, we argued, telephone arrest warrants should be allowed.⁴⁹ A few other states explicitly allow them, and a bill to permit them was introduced in 1983 in the Wisconsin Senate. I was happy to note it was supported by Wisconsin's Attorney General. As it turned out, the Supreme Court ignored the telephone warrant issue. I highly recommend, however, that the use of a telephone warrant be brought to any court's attention when considering warrantless arrests.⁵⁰

Stephen Kleinmaier's brief for Wisconsin was a solid and substantial work. He sharply contested our claim that the initial arrest must be viewed as for a civil forfeiture alone. The important point, he said, was that the arrest could have been for a jailable offense, as drunk driving is in some jurisdictions. The Supreme Court, he said, was "not required to accept the Wisconsin Supreme Court's erroneous belief that the arrest was for a forfeiture."⁵¹ The Supreme Court should independently examine the facts and circumstances and should conclude that the police had probable cause to arrest for a crime. The same rules, he argued, should apply to arrests for all offenses, whether they are labeled felony, misdemeanor or forfeiture. He, or one hopes his law clerk, industriously collected a comprehensive survey of the penalties for drunk driving in all the states. Wisconsin would violate no part of the United States Constitution if it decided to make the offense a major crime. He was quite correct in this conclusion. However, we argued that because Wisconsin chose to make drunk driving a lesser offense, the Court should accept Wisconsin law as it was enacted by its legislature and construed by its highest court.⁵²

Reply briefs may be filed at any time up to a week before oral argument.⁵³ We wanted to file it as quickly as possible since we did not know when oral argument would be scheduled and wisdom suggests that the Court be given time to read

48. 1983 Wis. Laws 1908.

49. See *Glodowski v. State*, 196 Wis. 265, 272, 220 N.W. 227, 230 (1928), which suggests an hospitable attitude toward warrants based on oral testimony.

50. See *United States v. Cuaron*, 700 F.2d 582, 590 (10th Cir. 1983).

51. Brief for Respondent at 11, *Welsh*, 104 S. Ct. 2091. The Court answered this argument with a citation to *Beck v. Ohio*, 379 U.S. 89, 91, 96 (1964).

52. Reply Brief for Petitioners at 2, *Welsh*, 104 S. Ct. 2091.

53. SUP. CT. R. 35.3.

it. I had predicted a mid-November argument on the basis of our place in line. But we learned on August 15 that we were scheduled for October 5, the third argument day for the 1983 term.

Our sixteen page reply brief was focused, as it had to be, only on the points raised in the State's brief. We contested the State's suggestion that the Court could ignore the Wisconsin court's characterization of the arrest as being for a civil forfeiture, and tried to explain what the *Welsh* case was *not* about. Cases involving arrests outside the home were not relevant, nor was the "hot pursuit" doctrine applicable. We characterized and distinguished all the lower court cases cited by the State as involving very different, and often dangerous, circumstances. Furthermore, we found a pair of recent House of Lords decisions almost exactly on all fours with the *Welsh* facts.⁵⁴ The Lords reluctantly held that a nonconsensual entry was forbidden by the common law, but they added that Parliament might change that law. I hoped that Chief Justice Burger, an admirer of British justice, would find the reference useful. Just before oral argument I discovered that Parliament did not approve of the House of Lords' decision invalidating warrantless home entries to take blood alcohol tests and, taking the Lords' advice, amended its statute to permit such entries.⁵⁵

Had we delayed the reply brief for a few weeks we would have found and cited *State v. Guertin*,⁵⁶ an uncommonly helpful decision which came out after the briefing deadline. It was eventually cited by Justice Brennan. In retrospect, Margaret and I should have spent more time discussing a dozen or so state court decisions applying, and not applying, the exigent circumstances doctrine. We cited most, but not all, of the state decisions that Justice Brennan referred to in his opinion. Frankly, I was unimpressed with most of them—they'd struck me as written hurriedly and without much analysis. The law review articles were more helpful, I thought, and I was pleased that Justice Brennan referred to three of the most

54. *Finnegan v. Sandiford, Clowser v. Chaplin*, [1981] 2 All E.R. 267.

55. Transport Act 1981, § 25, 51 HALSBURY'S STATUTES OF ENGLAND 1419 (1981). It became effective July 31, 1981.

56. 190 Conn. 440, 461 A.2d 963 (1983).

thoughtful, including the student note from the Arizona Law Review.⁵⁷

C. Oral Argument

The Supreme Court normally schedules oral arguments for five or six days each month on Monday, Tuesday and Wednesday. *Welsh* was the last case heard in the first week. Both of us were prepared to argue, but because I was admitted to the bar in 1957 and Margaret had not yet completed her third year of practice (three years experience is a prerequisite for admission to Supreme Court practice), I unashamedly asserted seniority. That we were prepared is a tribute to the moots we arranged with my Wisconsin colleagues Frank Remington and Frank Tuerkheimer as judges. Frank Tuerkheimer had recently completed a four year term as United States Attorney for the Western District of Wisconsin. Frank Remington's experience as a draftsman of rules and statutes is unparalleled. Both were sharp interrogators. After surviving their queries there was nothing to be nervous about in the Supreme Court.

We arrived in Washington in time to hear several preceding arguments, a practice I strongly advise. Some of the cases were especially newsworthy, and during the arguments in the *Sony*,⁵⁸ *Pennhurst*,⁵⁹ *Silkwood*⁶⁰ and Christmas creche⁶¹ cases all seats were occupied. By the time our case was called the great courtroom was sparsely settled. Relatives of arguing counsel were predominant, although it was heartening to see a dozen or so former students. The latter were doubtless wondering if I would confuse the Supreme Court as much as I had confused them.

The quality of the arguments we heard varied. Rex Lee, Solicitor General of the United States and a former law professor and dean, argued in a pleasant and persuasive manner with a large black loose leaf binder in front of him which he paged, but did not read. All lawyers in the Solicitor General's

57. See *Welsh*, 104 S. Ct. at 2099 n.13.

58. *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984).

59. *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900. (1984).

60. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984).

61. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

office wore formal morning dress—a tradition maintained even though half the arguments are held in the afternoon. The most impressive and, it turned out, effective argument was presented by Michael Gottesman of Washington on behalf of the Silkwood estate. His argument was directed at both Justices Brennan and Rehnquist, and he ultimately prevailed, capturing both their votes. It was a masterful performance noted also by the commentator in *The American Lawyer*.⁶² Some of the lawyers seemed less comfortable, but the Court was invariably attentive and the Chief Justice gracious and dignified.⁶³ Justices O'Connor and Stevens at opposite ends of the bench were vocal and often peppered counsel with questions which were pertinent and well phrased. I had the impression that Justice O'Connor had a list of prepared questions for each case.

Justice White looked aggressive, and in the *Silkwood* case showed that quality to defending counsel. When counsel turned aside a hypothetical by noting that "the issue you raised is not before the Court," White turned his right shoulder toward the dodging counsel, and said sharply, "the issue is before you now, counsel, and I'd like an answer."⁶⁴ Justice White is a severe inquisitor. His questions were addressed as much to the Justices beside him as to counsel in front. White's habit of following his question by swiveling his shoulders toward counsel disconcerted some. It was not rudeness, merely the unbreakable habit of a great running back with a powerful and independent mind. Justices Powell, Brennan and Blackmun were silent during nearly all of the arguments we heard. Justice Marshall's sense of humor and his caustic comments revealed his disposition more than they shed light on the case.

My notes for oral argument—a single 8 1/2" × 11" page—bear little resemblance to what I said. The Supreme Court Rules order that counsel not read, so counsel do not.

62. Mann, *Courtly Manners*, *THE AMERICAN LAWYER*, Dec. 1983, at 93.

63. On one occasion counsel was carried away with the argument and neglected to stop when the red light commanded. She continued until she noticed the light, then sat down in evident embarrassment. The Chief Justice immediately wrote a note and beckoned a page to deliver it to the offending counsel. She beamed on reading it and the Chief smiled warmly.

64. See *supra* note 62.

My first remarks were prompted by the argument in a preceding case, *Michigan v. Clifford*.⁶⁵ Several Justices had pressed counsel seeking to determine if an exigent circumstances issue was presented. Their tone implied that they were searching for an occasion to illuminate the doctrine. So my opening sentence was unplanned, but it captured attention: "This *is* an exigent circumstances case." Of course I wished the Court to reject the doctrine, so effort to get attention could have led to distracting questions, but the Justices were mercifully silent. My next sentence was a set piece, describing the issue as it was framed by our petition, and by the Supreme Court of Wisconsin. The Chief interrupted to ask at what time the home entry occurred. This was in the record, but it gave me a chance to point out that it was dark. I welcomed the question because Justice White in *Payton* had intimated his misgivings about nighttime entries, and Burger had evidently agreed.⁶⁶ Justice Rehnquist then asked several questions about the facts as found by the Wisconsin courts. Justice Marshall looked sympathetic, as his first question revealed: "I was always taught that at common law police could not arrest for a misdemeanor unless it was committed in their presence." Evidently he expected me to argue that the common law rule was required by the fourth amendment. That I did not wish to do—the Court has cited common law history, but has never held that the common law rules of arrest were congruent with the fourth amendment, and I did not sense that the Court would adopt a doctrine that would forbid states from modifying common law rules.

Justice O'Connor's questions revealed that she had read the briefs and the record. She focused on the possible application of the hot pursuit doctrine, and whether the claim we made could, if honored, yield a practical rule.

Then, Justice White, who I subsequently learned had had little sleep the night before because of a very troublesome and involved a petition to stay a death sentence, pressed me hard. The whole case, he said, turned on whether Wisconsin could deprive Welsh of a driver's license for refusal to take a blood

65. 104 S. Ct. 641 (1984).

66. *Payton v. New York*, 445 U.S. 573, 616 (1984) (White, J., Burger, C.J., Rehnquist, J., dissenting.)

test, and that was only a civil claim. He insisted that the issue turned on the exclusion of evidence, not the legality of an arrest. Why should the federal exclusionary rule apply in a civil case? Why shouldn't Wisconsin be allowed to attach civil consequences despite an illegal entry?⁶⁷ Justice White was not convinced that a constitutional claim was presented merely because the Wisconsin Supreme Court applied fourth amendment standards. In his dissent he made his view plain:

[I] am very doubtful that the policies underlying the Fourth Amendment would require exclusion of the fruits of an illegal arrest in a civil proceeding to remove from the highways a person who insists on driving while under the influence of alcohol. If . . . it would violate no federal policy to revoke Welsh's license even if his arrest was illegal—there is no . . . reason for us to review . . . even if [Wisconsin] mistakenly applied the Fourth Amendment.⁶⁸

Obviously Justice White was unpersuaded by my response that the Constitution should protect the home regardless of whether or not the underlying issues involve civil liabilities. I was surprised by Justice White's questions. His dissent in *Payton v. New York* suggested to us that he would be receptive to facts which distinguished *Welsh* from *Payton*, namely that *Welsh* involved a nighttime entry for a minor offense.⁶⁹ In *Payton*, White argued for the minority that daytime entries to arrest for a felony were permitted, and that liberty would be protected if warrants were required only for nighttime entries for minor offenses. Of course, there was no exigent circumstances issue in *Payton*.

Justice Rehnquist expressed the opinion that *Schmerber v. California*⁷⁰ was firmly against us. Mr. Schmerber, I said, was arrested at a hospital and was about to undergo medical treat-

67. The Court by a 5-4 vote subsequently held that the Immigration Service could deport an alien arrested after an illegal entry. *INS v. Lopez-Mendoza*, 104 S. Ct. 3479 (1984). Justice White was among the dissenters who urged that the exclusionary rule be applied in the administrative hearing. *Id.* at 3491-95. Evidently federalism interests were Justice White's dominant concern in *Welsh*.

68. *Welsh*, 104 S. Ct. at 2102.

69. Justice White had written: "These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home." *Payton*, 445 U.S. at 616 (White, J., Burger, C.J., Rehnquist, J., dissenting).

70. 384 U.S. 757 (1966).

ment. The blood test was taken about two hours after a serious automobile accident in which people were killed. Delay was not possible there. Delay to obtain a warrant was obviously possible in the *Welsh* setting.

The Wisconsin argument, presented by Stephen Kleinmaier, initially stressed the need to get evidence quickly. Justice Stevens asked Mr. Kleinmaier to review the facts which had led a jury to convict Welsh, and to explain why the lawfulness of the arrest was relevant. Kleinmaier also emphasized that drunk driving was a serious offense justifying serious law enforcement. His argument was short and to the point. My rebuttal was even shorter; I merely wanted to answer the questions posed by Justice Stevens relating to what evidence was used at the criminal trial—namely testimony by the arresting officer in the house, and evidence of a refusal to take a blood alcohol test. I was asked no questions, and anyone could see that the Justices were anxious to get away. I stopped ten minutes before my time expired. As I sat down the Justices all beamed; what was behind their evident delight? Had my trousers slipped? No—a few minutes later it became clear. The opening pitch in the World Series was scheduled for 3:00 P.M. The Justices left the bench in time to see it.

IV. CONCLUSION

The Court's opinion in *Welsh* did not come down until May 15, and by that time it was the oldest undecided case on the argument calendar. Why did such an apparently simple case take so long? Here I can only speculate. Justice Brennan obviously assigned the case to himself, and he had other pressing assignments in cases of greater significance than *Welsh*.⁷¹

71. Between October 5, 1983, and May 15, 1984, Justice Brennan wrote 23 opinions. Some were majority opinions, others were dissents or concurrences. See *Strickland v. Washington*, 104 S. Ct. 2052 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868 (1984); *McDonald v. City of West Branch*, 104 S. Ct. 1799 (1984); *Municipal Court v. Lydon*, 104 S. Ct. 1805 (1984); *I.N.S. v. Delgado*, 104 S. Ct. 1758 (1984); *United States v. Jacobsen*, 104 S. Ct. 1652 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *NLRB v. City Disposal Sys., Inc.*, 104 S. Ct. 1505 (1984); *Blum v. Stenson*, 104 S. Ct. 1541 (1984); *Keeton v. Hustler Magazine*, 104 S. Ct. 1473 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464 (1984); *Heckler v. Mathews*, 104 S. Ct. 1387 (1984); *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984); *Grove City College v. Bell*, 104 S. Ct. 1211 (1984); *NLBR v. Bildisco*, 104 S. Ct. 1211

The court rejected the defendant's argument in nine of the eleven fourth amendment cases heard in the 1983 term.⁷² Justice Brennan dissented in most. Hence, it is plausible that Justice Brennan treasured the opportunity to write an opinion sustaining a fourth amendment claim and that he sought to write as strong an opinion as possible. The delay may also be attributable to the difficulty in holding his majority. That he got the vote of Justice O'Connor is notable. In nearly 92% of the cases that year she voted with Justice Rehnquist,⁷³ but in *Welsh* they split.

Welsh v. Wisconsin teaches two lessons. First, the "hot pursuit" doctrine is circumscribed. "The claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of the crime."⁷⁴ Second, the exigent circumstances doctrine remains a significant exception to the warrant requirement, but an unusually strong presumption exists against it for minor crimes. Although the Court declined to rule whether the exclusionary rule bars warrantless arrests for minor offenses,⁷⁵ I believe there is strong support for that argument. The thrust of Justice Brennan's opinion appears to change following his approval of Justice Jackson's concurrence in *McDonald v. United States*.⁷⁶ The reader might conclude until then that the Court is about to set forth a firm, if not absolute, rule suggesting that the exigent circumstances doctrine is never applicable for minor offenses. Instead, the remainder of the

(1984); *South Carolina v. Regan*, 104 S. Ct. 1107 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984); *Pennhurst State School Hosp. v. Halderman*, 104 S. Ct. 900 (1984); *Pulley v. Harris*, 104 S. Ct. 871 (1984); *Daily Income Fund v. Fox*, 104 S. Ct. 831 (1984); *McDonough Power Equip., Inc. v. Greenwood*, 104 S. Ct. 845 (1984); *I.N.S. v. Phinpathya*, 464 U.S. 183 (1984); *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Auth.*, 464 U.S. 89 (1983). The list does not include memoranda in cases denied review, nor does it reflect work on cases denied after May 15, 1984.

72. Fourth Amendment claims were rejected in *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984); *Segura v. United States*, 104 S. Ct. 3380 (1984); *United States v. Leon*, 104 S. Ct. 3479 (1984); *Oliver v. United States and Maine v. Thornton*, 104 S. Ct. 1735 (1984); *I.N.S. v. Delgado*, 104 S. Ct. 1758 (1984); *United States v. Jacobsen*, 104 S. Ct. 1652 (1984); *Donovan v. Lone Star*, 104 S. Ct. 769 (1984).

73. See Table of Voting Alignments in *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 308 (1984).

74. *Welsh v. Wisconsin*, 104 S. Ct. 2091, 2099 (1984).

75. *Id.* at 2097 n.11.

76. 335 U.S. 451 (1948).

opinion is anchored to the facts, and the exigent circumstances doctrine, broadly stated at first, is more sharply focused.

The line between major and minor crimes appears to be decisive to the application of the exigent circumstances doctrine. In this regard the *Welsh* decision raises new problems. The origin of the distinction lies in the common law limiting police power to arrest for misdemeanors. The Court, however, does not anchor the constitutional rule to the common law, but instead looks to the penalty attached by state legislatures. Focusing on the penalty alone is misleading, however. It is demonstrably true that Wisconsin and some other states declined to make a first drunk driving offense a crime because it contributes to an ease of conviction. Doubtless, lawmakers felt that too stringent first offender penalties would bear heavily on constituents, or even upon themselves. Justice Blackmun's criticism of Wisconsin for its lenient treatment of first offenders is off the mark.⁷⁷ The important point is not the penalty, but the home invasion which occurred when the suspect posed no danger to the public. Edward Welsh abandoned his car before hurting anyone, and walked home to bed. This is what a conscientious citizen should do. The important point in *Welsh* is that the majority of the Court maintained a treasured value. The home should not be invaded without consent, or without the intervention of an independent magistrate, except in the most unusual cases where the public interest is so compelling that there is no other reasonable alternative.

If the decision had gone the other way *Welsh v. Wisconsin* would have been a landmark case. We might envisage a New York Times headline, "Court Allows Nighttime Warrantless Home Entry to Arrest Drunk," or perhaps "States Free to Ignore Fourth Amendment in Civil Cases." The holding is narrowed and anchored to the facts. Therefore, the meaning of the exigent circumstances rule remains uncertain, although I think that after *Welsh* lower courts are on safe ground if they adopt a multi-factor balancing approach. The Court declined to approve explicitly the seven factor formula of

77. See *Welsh*, 104 S. Ct. at 2100 (Blackmun, J., concurring).

*Dorman v. United States*⁷⁸ but cited that leading case, with others that applied a totality of circumstances approach, as authority for considering the nature of the offense.

What happened to the case after the Supreme Court remanded for not inconsistent proceedings? It remains active. The State declined to drop the case, perhaps fearing a civil rights action if they did, and sought a hearing on whether or not entry was consensual. On February 5, 1985 Judge Frankel held that hearing. The stepdaughter who answered the door had been examined and cross examined by opposing counsel in the summer of 1982, and her testimony was preserved on videotape. She denied having given any authority to enter the home. Her sister and Mrs. Welsh sought to corroborate. Police Officer Daley and two other Madison policemen testified that they received consent to enter. The issue, Judge Frankel stated, turned on credibility. He decided that the State had proved consent, but his ruling is being appealed to the Wisconsin Court of Appeals.

78. 435 F.2d 385 (D.C. Cir. 1970).